Proper Steel Erectors, Inc., and its alter ego B & M Steel Erectors, Inc. *and* Iron Workers Upstate Locals of New York and Vicinity, Consisting of International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local Union Nos. 60, 33, 9, 440, 6, and 12. Case 3–CA–24700

September 19, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The General Counsel seeks default judgment in this case on the ground that the Respondents have failed to file a timely answer to the complaint. Upon a charge filed on February 17, 2004[1] by the Union, Iron Workers Upstate Locals of New York and Vicinity, consisting of International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local Union Nos. 60, 33, 9, 440, 6, and 12, the General Counsel issued a complaint on October 28, 2004,[2] against Proper Steel Erectors, Inc., and its alter ego, B & M Steel Erectors, Inc., the Respondents, alleging that they violated Section 8(a)(5) and (1) of the Act. The Respondents failed to file an answer.

On February 2, 2005, the General Counsel filed a Motion for Default Judgment with the Board. On February 7, 2005, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On February 22, 2005, the Respondents filed a response to the Board's notice and opposition to the General Counsel's motion, as well as an answer to the complaint allegations. The General Counsel filed a reply to the Respondents' opposition on February 28, 2005.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint served on the Respondents affirmatively stated that unless an answer was filed by November 12, 2004, all the allegations in the complaint could be found to be true. Further, the undisputed allegations in the General Counsel's motion disclose that the Region, by letter dated November 23, 2004, notified the Respondents that unless an answer was received by December 14, 2004, a Motion for Default Judgment would be filed.

By letter to the Regional Office dated December 14, 2004, an attorney requested a "two-week extension of time for the Respondent companies to answer or otherwise appear in this case." The attorney specifically stated that he was not representing the Respondents in this proceeding, but was assisting them in obtaining counsel.[3] The extension of time was not granted.

Not until February 22, 2005, 2 weeks after the Board issued a Notice to Show Cause upon the General Counsel's Motion for Default Judgment, did the Respondents file an answer to the complaint, along with an opposition to the motion with supporting affidavit.

The Respondents claim they did not receive notice of the unfair labor practice proceeding until November 25, 2004, when their president, Michael Reed, was person-

[1] On February 17, 2004, and again on February 23, 2004, a copy of the charge was sent by regular mail to the Respondent's state-registered address at 2651 Henneberry Road, Pompey, New York, 13138. On both occasions, the charge was returned to the Regional Office marked "not deliverable as addressed."

[2] A copy of the complaint was sent by certified mail to the Respondents' state-registered address in Pompey, New York, on October 28, 2004. The complaint was returned to the Regional Office marked "not deliverable as addressed." On November 5, 2004, the complaint was again served on the Respondents by certified mail at the above address, as well as at two other addresses: 8881 Center Pointe Drive, Baldwinsville, New York 13027, the Respondents' acknowledged business/residential address; and 2581 Henneberry Road, Pompey, New York, an address located through Choice Point, a company that provides business locator services. Both complaints served at the Henneberry Road addresses were returned marked "not deliverable as addressed." The complaint served at the Baldwinsville, New York business/residential address was returned to the Regional Office marked "unclaimed."

Another copy of the complaint was sent by certified mail on November 23, 2004, to each of the three addresses listed above. In the cover letter, the General Counsel notified the Respondents that they had not filed an answer to the complaint and that unless an answer was received by December 14, 2004, he would file a Motion for Default Judgment with the Board. The letters served at the Henneberry Road addresses were returned to the Regional Office marked "undeliverable." The letter sent to the Respondents at their Center Pointe Drive address was not returned.

The Respondents admit that they received the General Counsel's papers on or about November 25, 2004. Even absent that admission, however, a respondent's failure to provide for appropriate service by failing to update its address of record cannot be used to circumvent service under the Act. The same is true with respect to a respondent's refusal to claim certified mail. See, e.g., *Michigan Expediting Service*, 282 NLRB 210 fn. 6 (1986); *1500 Met Drug, Inc.*, 326 NLRB No. 148 (1998) (Decision not reported in Board volume); *Environmental Construction Inc.*, 333 NLRB No. 10 (2001) (Decision not reported in Board volume).

[3] In his letter requesting an extension of time, that attorney stated that he represents Respondent B & M Steel Erectors, Inc. in other matters.

ally served at his 8881 Center Pointe Drive, Baldwinsville, New York home.[4] Reed states in an affidavit that he was unaware that an extension of time had not been granted, and the Respondents were thereafter repeatedly thwarted in their effort to secure legal representation.[5]

Other than their failure to obtain counsel, the Respondents offer no explanation for their failure to file a timely answer. The Respondents admit that they did not verify whether an extension of time had been granted, and have not adequately explained why they did not provide an answer until 8 weeks beyond the requested extension date and 3 weeks after a default motion had been filed. Under the circumstances, including the Respondents' pattern of ignoring and/or refusing service of Government documents, imposition of default judgment is proper. See *TNT Logistics, Inc*., 344 NLRB No. 61 (2005); *Cray Construction Group*, 341 NLRB No. 123, slip op. at 1 fn. 5 (2004); *Patrician Assisted Living Facility*, 339 NLRB 1153 (2003).

In the absence of good cause being shown for their failure to timely file an answer, we grant the General Counsel's Motion for Default Judgment.[6]

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, Respondents Proper Steel Erectors, Inc. and B & M Steel Erectors, Inc., corporations with offices and places of business in Pompey, New York, and Central Square, New York, have been engaged in the business of steel erection in the construction industry.

Upstate Iron Workers Employers Association, Inc. (the Association) is an organization composed of construction industry employers which, inter alia, represents employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union.

Since about January 14, 2002, Respondent Proper Steel Erectors, Inc. has been a member of the Association and has authorized the Association to represent it in negotiations and administering collective-bargaining agreements with the Union.

At all material times, Whitacre Engineering Co., a corporation with an office and place of business in Liverpool, New York, has been engaged in the business of providing engineering services in the construction industry and has been a member of the Association. In conducting its business operations, Whitacre Engineering Co. annually purchases and receives at its Liverpool, New York facility goods valued in excess of $50,000 directly from points outside the State of New York.

We find that at all material times the Respondents have been employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act[7] and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their names, and have been supervisors of Respondent Proper Steel Erectors, Inc. and Respondent B & M Steel Erectors, Inc. within the meaning of Section 2(13) of the Act.

> Michael Reed—President and Owner—Proper Steel Principal—B & M Steel
>
> William Reed—Estimator—Proper Steel and B & M Steel

On or about May 1, 1999, the Association and the Union entered into a collective-bargaining agreement effective from May 1, 1999 to April 30, 2003. On or about August 20, 2001, Respondent Proper Steel entered into a written agreement to be bound by the terms and conditions set forth in the 1999–2003 collective-bargaining agreement between the Union and the Association.

Thereafter, the Association and the Union entered into a successor collective-bargaining agreement, referred to

[4] Documentation supporting the General Counsel's motion demonstrates that all charges, complaints, and reminder letters were sent to Respondents by regular and/or certified mail, not by personal service. The General Counsel suggests, therefore, that the Respondents may have confused what legal documents were personally served on Reed at his home. Nonetheless, as noted above, the Respondents admit service of the General Counsel's papers on or about November 25, 2004.

[5] Reed asserts in his affidavit that a second attorney declined to represent the Respondents because of a conflict of interest, and a third cited calendar constraints precluding his representation. The Respondents' current counsel entered his appearance on their behalf on February 17, 2005.

[6] While Member Schaumber endorses the view that it is preferable to decide cases on the merits, he agrees with his colleagues that the Respondents have not shown "good cause" for their failure to file a timely answer. See generally his position in *Patrician Assisted Living Facility*, 339 NLRB 1153, 1156–1161 (2003). The Respondents had Attorney D. Christian Fischer (who was not representing them in this matter) send a letter to the Regional Office requesting a 2-week extension on December 14, 2004, and the Respondents admit that their president received a copy of the request. However, the Respondents never followed up on this request or subsequently informed the Regional Office of their difficulties in obtaining legal representation, nor did the Respondents provide an answer within the 2-week timeframe that Attorney Fischer originally requested. Thus, the Respondents have not provided a sufficient reason for their untimely answer.

[7] All association members who participate in, or are bound by, multiemployer bargaining are considered to be a single employer for jurisdictional purposes. *Insulation Contractors of Southern California*, 110 NLRB 638 (1954).

as the Association agreement, effective from May 1, 2003 to April 30, 2006.

The following employees constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> Those employees working for the Respondents within the craft jurisdiction and the geographic territories of the Union set forth respectively in Articles 1 and 2 of the collective-bargaining agreement between the Respondents and the Union, which is effective from May 1, 2003, to April 30, 2006.

Respondent Proper Steel granted recognition to the Union as the exclusive collective-bargaining representative of its employees in the unit described above. This recognition has been embodied in successive collective-bargaining agreements; the most recent is the Association agreement effective May 1, 2003 to April 30, 2006.

Since about February 1, 2004, Respondent B & M Steel has been utilized by Respondent Proper Steel as a subordinate instrument to, and a disguised continuance of, Respondent Proper Steel. At all material times, the Respondents have been affiliated business enterprises with common business purposes, management, and supervision; have formulated and administered a common labor policy; have shared common equipment and vehicles, premises and facilities; have shared employees and customers; and have held themselves out to the public as a single integrated enterprise.

Since about February 1, 2004, the Respondents have repudiated and failed and refused to adhere to all the terms and conditions of the Association agreement, and have specifically failed to adhere to its terms relating to wages and fringe benefits, including health and welfare, pension, and annuity benefits for its unit employees.

CONCLUSION OF LAW

By the conduct described above, the Respondents have failed and refused to bargain collectively and in good faith with the exclusive bargaining representative of its employees, and have thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1), and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, we shall order them to cease and desist from those practices and to take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondents to make unit employees whole for any wages and other benefits lost as a result of their failure to abide by the terms of the collective-bargaining agreement, computed in accordance with *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). We shall further order the Respondents to make whole all benefit funds provided by the agreement for any failure to make the contractually required contributions, with any additional amounts due funds computed in the manner set forth in *Merryweather Optical Co.*, 240 NLRB 1213, 1216 fn. 7 (1979). Finally, we shall order the Respondents to reimburse employees for any losses they may have suffered as a result of their failure to make contributions to contractually-required benefit funds, in the manner prescribed in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as provided in *New Horizons for the Retarded*, supra.

ORDER

The National Labor Relations Board orders that the Respondents, Proper Steel Erectors, Inc., and its alter ego B & M Steel Erectors, Inc., Pompey and Central Square, New York, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain collectively with the Union, Iron Workers Upstate Locals of New York and Vicinity, consisting of International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local Union Nos. 60, 33, 9, 440, 6, and 12 by repudiating and failing and refusing to adhere to all the terms and conditions of the collective-bargaining agreement, including but not limited to those pertaining to wages and fringe benefits, including health and welfare, pension, and annuity benefits, for the unit employees. The unit includes those employees working for the Employer within the craft jurisdiction and the geographic territories of the Union set forth respectively in articles 1 and 2 of the collective-bargaining agreement between the Employer and the Union, which is effective from May 1, 2003 to April 30, 2006.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Adhere to the terms of the collective-bargaining agreement between the Union and the Association and make the unit employees and benefit funds whole for any losses they have suffered as a result of the Respondents' failure to abide by those terms, with interest in the manner set forth in the remedy.

(b) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for

good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of the records stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(c) Within 14 days after service by the Region, post at their facilities in Pompey and Central Square, New York, copies of the attached notice marked "Appendix."[8] Copies of the notice on forms provided by the Regional Director for Region 3, after being signed by the Respondents' authorized representative, shall be posted by the Respondents and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, any of the Respondents have gone out of business or closed the facilities involved in these proceedings, that Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by that Respondent at any time since February 1, 2004.

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that they have taken to comply.

Dated, Washington, D.C. September 19, 2005

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Robert J. Battista, Chairman

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Wilma B. Liebman, Member

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Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to bargain collectively with the Union, Iron Workers Upstate Locals of New York and Vicinity, consisting of International Association of Bridge, Structural, Ornamental, and Reinforcing Iron Workers, Local Union Nos. 60, 33, 9, 440, 6, and 12, by failing and refusing to adhere to the terms and conditions of our collective-bargaining agreement, including but limited to those pertaining to wages and fringe benefits, including health and welfare, pension, and annuity benefits, for our unit employees. The unit includes those employees working for the Employer within the craft jurisdiction and the geographic territories of the Union set forth respectively in articles 1 and 2 of the collective-bargaining agreement between the Employer and the Union, which is effective from May 1, 2003 to April 30, 2006.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL adhere to the terms of the collective-bargaining agreement between the Union and the Association, and WE WILL make the unit employees and benefit funds whole for any losses they have suffered as a result of our failure to abide by those terms, with interest.

PROPER STEEL ERECTORS, INC., AND ITS ALTER EGO B & M STEEL ERECTORS, INC.